No. 77-1670

IN THE

Supreme Court of the United States

October Term, 1978

SUFFOLK OUTDOOR ADVERTISING COMPANY,
Appellant,

v.

THEODORE O. HULSE, *et al.*,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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The motion to dismiss does not succeed in negating the substantiality of the questions whether, consistent with First, Fifth and Fourteenth Amendments, a local government can expel from every inch of land over which it has legislative power the oldest and least expensive of our media of communication and can do so without compensating the proprietor. We respond briefly to the motion below.

I. THE FIRST AMENDMENT QUESTION

The Town of Southampton has adopted an ordinance that would expel from the Town all off-premises outdoor advertising structures; the defense of the ordinance against

appellant's First Amendment challenge is that it is a mere "place and manner restriction" on speech whose validity is sustained by a decision of this Court. (Motion 15.) The defense fails because (1) the ordinance effects a total prohibition of a medium of communication, not a mere restriction of some uses of the medium, (2) the question whether such a prohibition is valid is at least an open one in this Court and is not concluded by the decision on which the Town relies, and (3) regarded as a "time, place or manner restriction," the ordinance does not satisfy the standards for such restrictions laid down in *Virginia Pharmacy Bd.* v. *Virginia Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

A

The Town says that the appellant Suffolk Outdoor is wrong when it speaks of the ordinance prohibiting the use of an entire medium of communication in Southampton or expelling a medium of communication from Southampton, because on-premises or accessory signs are permitted. (Motion 5-6, 15-16.) An on-premise or accessory sign directs attention to goods or services sold or offered on the "same lot" as the sign. We noted the exception in our jurisdictional statement (Jur. St. 3 n.2), and we find no occasion for qualifying the way we characterized the breadth of the ordinance there. The familiar standardized outdoor advertising structures or billboards are quite different from signs that announce a tradesman's presence. The functions of the two kinds of signs overlap, but they are not the same. The off-premise billboard is fairly regarded as a separate medium of communication. The Southampton Town Board obviously did not believe that, in drawing the ordinance as it did, it was arbitrarily discriminating in favor of some signs and against others. To the contrary, it thought that it

was dealing with two different kinds of signs that it could reasonably treat differently.[1]

B

In a very recent billboard decision the United States District Court for the District of Maine said that "the Supreme Court has never ruled on the constitutionality of comprehensive anti-billboard legislation . . . ." *John Donnelly & Sons v. Mallar*, D. Me. Civil No. 77-284-SD, decided July 11, 1978, slip op. at 8. In a footnote to that

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[1]The Town also intimates (Motion 8) that its ordinance has less of a geographical sweep than we have accorded it by suggesting that standardized outdoor advertising structures are not prohibited in the five incorporated villages that comprise .9% (10,270 acres) of the Town's total area. *See* Surveys and Analyses Report, Part 1, Southampton Community at 2-3 (1970); Town of Southampton, Master Plan Report 37. The intimation is not true, even aside from the de minimis size of the incorporated villages. First, although the Town's legislators may have intended to expel signs only from the unincorporated portions of the Town, the pertinent provisions of the ordinance read in Town-wide terms. See Ordinance § 3-50-60.07 ("Billboards are prohibited in all Districts"); § 3-110-70.03 ("Anything to the contrary in this Ordinance notwithstanding, any nonconforming billboard, . . . wherever located, shall . . . be removed"). (Jur. St. 3.) All three of the courts below characterized the ordinance's application as Town-wide. (See Jur. St. 2a, 9a, 10a, 12a, 43a.) Second, it is not clear on the record whether and, if so, to what extent the Town retained zoning power as against the villages. *See* Century Fed. Sav. & Loan Ass'n v. Village of Atlantic Beach, 86 Misc.2d 863, 383 N.Y.S.2d 524 (Sup. Ct., Spec. T., Nassau Co. 1976). Third, even if the Town ordinance does not mean what it says, each of the incorporated villages has a zoning ordinance of its own that effects a village-wide expulsion of all standardized off-premises outdoor advertising signs. *See* Village of Southampton Zoning Ordinance, §§ 1-30-20.64, 3-50-60.07, 3-110-70.03-04 (1973); Zoning Ordinance for the Village of Westhampton Beach, Inc., Art. IX, Section 3.B.2(a) (1977); Zoning Ordinance (Ordinance No. 26) of the Village of Quogue, § 6(w)(3) (1954); Zoning Ordinance of the Village of Northaven, Art. V, § 5.2.2.a, Art. VII, § 7.1.5 (1973); Zoning Ordinance, Code of the Village of Sag Harbor, § 55-27 (1973).

statement the court quoted this Court's statement in *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 94 n.7 (1977), that it was not deciding in that case "whether a ban on signs or a limitation on the number of signs could survive constitutional scrutiny if it were unrelated to the suppression of free expression." *Id.*, slip op. at 8 n.6.

The Maine district court sustained against a First Amendment challenge a Maine statute eliminating most billboards from along the public roads of the state. We believe that decision is wrong for many of the reasons set forth in the jurisdictional statement and this brief. But the significant point is that the Maine court did not regard the First Amendment question as other than substantial, *i.e.*, as "so clearly lacking in merit that upon mere citation of our decisions it may be put aside as not requiring further consideration." *Alton R.R. v. Illinois Commerce Comm'n*, 305 U.S. 548, 550 (1939).

The Maine district court was aware of the case whose mere citation Southampton erroneously contends allows one to put aside the First Amendment question here without further consideration. The case is *Markham Adv. Co. v. Washington*, 73 Wash.2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969). The court itself cited *Markham*, slip op. at 8, and of course *Markham* was cited with a "cf." in the quoted passage from *Linmark*, in which this Court apparently regarded the question not as foreclosed but as open.

In *Markham*, a state statute required the removal of most billboards within 660 feet of interstate highways and other designated highways. It had the effect of requiring the relocation of approximately 6 percent of the plaintiffs' billboards in the state. 73 Wash.2d at 414, 439 P.2d at 254. Excepted from the statute's 660-foot setback restriction were some signs advertising activities conducted within 12

miles of the signs.[2] 73 Wash.2d at 410, 417, 439 P.2d at 252, 256.

The state court's consideration of the First Amendment question posed by this statute was brief, barely more than a column. 73 Wash.2d at 428-29, 439 P.2d at 262-63. The only First Amendment decision of this Court cited in support of its holding that the statute did not abridge freedom of speech was *Valentine v. Chrestensen*, 316 U.S. 52 (1942). In the same two-paragraph section of its opinion, the state court cited one other First Amendment decision of this Court, *Kovacs v. Cooper*, 336 U.S. 77 (1949), and that only for its admonition that "to enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself."[3] Also cited was *Packer Corp. v. Utah*, 285

[2]It was presumably this aspect of the statute and the *Markham* decision that Mr. Justice Stevens had in mind when, in cataloging permissible restrictions on speech, he cited *Markham* for the proposition that "[a] state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere . . . ." Young v. American Mini Theatres, Inc., 427 U.S. 50, 68 (1976). The statement is attributed by the Town to "the Court" (Motion 22), but it is in a part of the prevailing *Young* opinion in which only three other Justices joined. It would not in any event control this case, and we submit that it cannot properly be read as forecasting the answer to the question that, next term, all participating members of the Court in Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 94 n.7 (1977), indicated was open.

[3]The Town leans heavily on *Kovacs* as direct and independent support for the proposition that, under the rubric of "place and manner restrictions," government may ban a medium of mass communication from an entire municipality. (*See* Motion 14, 21, 22, 24.) *Kovacs* and the body of caselaw of which it is a central part flatly refute that very proposition. As the Court has often explained, all that was at issue in *Kovacs* was a *limitation* on the use of sound trucks. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 n.18 (1976); Buckley v. Valeo, 424 U.S. 1, 18 n.17 (1975) ("the decibel restriction upheld in *Kovacs* limited the *manner* of operating a sound truck, but not the *extent* of its proper use"); California v. LaRue, 409 U.S. 109, 117 n.4 (1972) (characterizing the *Kovacs* ordinance as "forbidding sound

U.S. 105 (1932), which sustained against equal protection and commerce clause claims a state statute that prohibited cigarette and other tobacco product advertising on "any bill board, streetcar sign, placard, or any other object or place of display," but that permitted such advertising "in any newspaper, magazine or periodical. . . ."

The state court summed up its First Amendment holding thus:

> "This intrusive quality of highway outdoor advertising, coupled with the hazard it poses to traffic safety and its purely commercial nature, all persuade us that RCW 47.42 is a reasonable regulation which does not violate the First Amendment." 73 Wash.2d at 429, 439 P.2d at 262-63.

In the present case, there is no issue of traffic safety; in the three courts below and in this Court, the Town has stated that the sole purpose of the ordinance is to promote "aesthetics," and the courts below upheld the ordinance on that ground alone.[4] We discuss "intrusiveness" below (pp.

trucks in residential neighborhoods"); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969). Indeed, in the term prior to the *Kovacs* decision, the Court struck down a city ordinance that forbade the use of sound amplification devices without the prior permission of the city's police chief. Saia v. New York, 334 U.S. 558 (1948). In so holding, the Court noted that "the statute is not narrowly drawn to regulate the hours or places of use of loudspeakers, or the volume of sound (the decibels) to which they must be adjusted." 334 U.S. at 560.

[4]Traffic safety is probably not even a rational basis for anti-billboard legislation. *See* "Analysis and Modeling of Relationships Between Accidents and the Geometric and Traffic Characteristics of the Interstate System," Office of Research and Development, Traffic Systems Division, Bureau of Public Roads, Federal Highway Administration, U.S. Dep't of Transportation (1969). The report published the results of a study of more than 40,000 accidents that occurred over a seven-year period in 20 states covering over 8,000 miles of interstate highway.

11-12, *infra*); it is enough to say at this point that, after *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the label has lost its ability to justify restrictions on public speech. So, with the demise of the supposed rule of *Valentine v. Chrestensen* excluding speech of a "purely commercial nature" from First Amendment protection, *Markham* has no underpinning pertinent to this case. On its facts and on the law it purported to express, *Markham* does not control this case.

C

The Southampton ordinance cannot successfully be defended as a "time, place or manner" restriction of speech because it does not satisfy the three standards set forth by this Court in *Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). That is, the Town has not justified its ordinance "without reference to the content of the regulated speech," and it has not shown that its billboard prohibition serves "a significant governmental interest" or that it leaves "open ample alternative channels for the communication of the information." In its jurisdictional statement, Suffolk Outdoor took up these standards in reverse order of their articulation by the Court in demonstrating that they are not satisfied by the Southampton ordinance. We follow that order again in addressing the Town's effort in its motion to show the contrary.

1. **Alternative Channels.** Against the hard facts recited in the jurisdictional statement concerning the unique efficiency and economy of outdoor advertising as a medium of communication (Jur. St. 4-7, 14-16, 22-23), the Town

Among conclusions was that there was no adverse relationship between accidents and advertising signs and that the presence of advertising signs seemed indeed to be associated with a decrease in the number of accidents. *Id.* at 20.

pits these three pronouncements: (a) The ordinance permits "on-premises or accessory signs" and these are "ample alternative channels for communication" (Motion 20); (b) "other ample alternative channels are left open — such as newspaper, radio and television advertising, or even handbills or leaflets" (*id.*); and (c) "outdoor advertising has become a less and less important facet of the advertising business" (*id.* at 21). The first of these pronouncements is unresponsive, and the latter two are demonstrably incorrect.

As noted above, the prohibition of the ordinance does not extend to signs that direct attention to goods or services sold or offered on the "same lot" as the sign. This dispensation for on-premises signs is a blessing to those of Southampton's businesses located on major commercial thoroughfares. But it leaves no "alternative," "ample" or otherwise, for Southampton's businesses located on side streets, above street level or below ground, and thus without a parking lot or a brick wall to permit posting of their advertising signs. And, of course, the freedom to post a sign that makes known the presence and nature of one's business offers nothing for many non-commercial advertisers, *e.g.*, the candidate for Town or village supervisor or board member, the proponent of a fund drive or the advocate of family planning,[5] to say nothing of the national or regional commercial advertiser whose business is not transacted on any particular Southampton "lot."

The inaccessibility to many advertisers of modest means of radio and television and the daily newspapers is documented at pages 14-16 of the jurisdictional statement. To claim that, for a local political candidate, a $6,000 30-

[5]*Cf.* Mitchell Family Planning, Inc. v. City of Royal Oak, 335 F. Supp. 738 (E.D. Mich. 1972) (holding violative of the First Amendment a city ordinance that prohibited billboard advertising of abortion information).

second television spot on a New York City station is an "ample alternative" to one or more inexpensive local signboards is to rob that phrase of the meaning given to it by this Court in *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). (*See* Jur. St. 13-14.) "Handbills or leaflets" surely are not "ample alternative channels for communication" of political, civic or commercial information to the persons who live or regularly transact business in the 171 square miles of what the motion itself refers to as a "rural town." (Motion 7.)[6]

Finally, if the outdoor advertising industry's percentage share of gross national advertising revenues has dipped a fraction of a percentage point, that is only because outdoor advertising, which "uses little energy and creates no waste,"[7] has kept tight rein on its cost to advertisers, while the other mass media have steadily increased their prices.[8] The demand for sign space has never been greater: On the national level, in 1977 outdoor advertising revenues totalled $461,757,084, *see Outdoor Advertising Expenditures*, in-

[6]The "rural town" description fairly suggests the problems a handbiller or leafleteer would have in finding large concentrated groups of Southampton residents or business visitors. On the other hand, if it suggests placid rusticity, it paints a distorted picture of the Town as it now is and will develop. The Town is correct in noting that once it wished it would see a limitation on part of its population growth (*i.e.*, year-round residents outside the incorporated villages). (Motion 10-11.) The repeated expression of the wish does not, however, render "erroneous or misleading" our statement of fact, taken number-for-number from the Town's Master Plan at 20, that the Town projected that "by 1990 Southampton's year-round and 'seasonal' (summer and weekend) populations would reach 84,000 and 175,100, respectively" (Jur. St. 6).

[7]"The Low-Priced Spread," Forbes, Jan. 15, 1977, at 64 ("With other advertising rates rising rapidly, billboards are starting a comeback by being the cheapest game in town").

[8]*Id.*; "For Billboards, the Signs are Bullish," The New York Times, June 25, 1978, § 3, p. F3, col. 1.

side cover page (Leading National Advertisers, Inc. 1978); prior five-year comparisons had shown that outdoor advertising industry revenues rose 41.4 percent between 1970 and 1975 and 8.3 percent between 1974 and 1975 alone. *Ayer Media Facts* 2 (1976-77). We are not dealing here with a dying medium, to which alternatives have proved more attractive.[9]

2. **Significant Government Interest.** In the courts below and in its present motion to dismiss, the Town has presented as justification for its ordinance two catch-phrases taken from inapposite decisions, "captive audience" and "unsightly intrusion," and the vague, unspecific interest in aesthetics attributed to it by the Court of Appeals. (Motion 6-7, 17, 19, 21.) To attempt to sustain an ordinance on such bases is to ignore a lesson that this Court has had to remind us of again and again: Rights protected by the First Amendment "may not be abridged because of state interests asserted by appellate counsel without substantial support in the record or findings of the state court." *In re Primus*, No. 77-56, decided May 30, 1978, slip op. at 20 n.27 (1978); *see also First Nat'l Bank v. Bellotti*, No. 76-1172, decided April 26, 1978, slip op. at 22-23; *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576,581 (1971); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *NAACP v. Button*, 371

[9]The misleading decline in the percentage of total dollar advertising outlays that are accounted for by billboards was relied on by the court in John Donnelly & Sons v. Mallar, D. Me. Civil No. 77-284-SD, decided July 11, 1978, slip op. at 13, n.10, in finding that "[t]he overwhelming majority of advertisers thus already avail themselves of alternative modes of communication." Unlike the Southampton ordinance, the Maine statute sustained in *Donnelly* exempts noncommercial communications, and the district court believed — erroneously, we submit — that commercial advertisers would be able adequately to convey their messages through on-premises signs and the official business directional signs and tourist information centers for which the Maine statute specifically provides.

U.S. 415, 442-43 (1963); *Wood v. Georgia*, 370 U.S. 375, 387-88 (1962); *Thomas v. Collins*, 323 U.S. 516, 530, 536 (1945). It is not enough for government to proclaim its purpose a high-minded one that in the defining words chosen by its lawyer rests neatly beside some prior case deciding some constitutional question.

Absent from the Town's present defense of its ordinance is any evidence from which even an inference could be drawn that there is no room in Southampton for Suffolk's signs, that they are "basically incompatible with the normal activity" of any of the 28 "particular places[s]" they now occupy. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).[10] Nor is there any elaboration of the "aesthetic purpose" that will be served by removing standard-sized, well-constructed and well-maintained structures advertising career opportunities in the United States Army and Marine Corps, federal government energy conservation and other programs, and the goods and services offered by businesses located within the Town, from the very streets on which those and other businesses and industrial uses are maintained. If the Town's purpose in enacting and defending the ordinance was, as the Town's appellate counsel now urges, the "preservation of community appearance and character" (Motion 17, 19, 21), the Town would permit the "preservation" of Suffolk's signs in the locations they have occupied since as early as 1934.

The supposed intrusiveness of billboards cannot be made to justify their prohibition. That was made clear in *FCC v.*

[10]Despite general statements concerning its zoning goals (Motion 9-10), the town offers no elucidation of actual land use in Southampton. Suffolk stands behind its assertions that "each of its signs is located on or adjacent to a major commercial thoroughfare linking Southampton with other area communities" (Jur. St. 6-7), and that each such sign is located in a zoning district "occupied also by other commercial establishments" (*id.* at 4). Proof of the assertions rests in Southampton's own Master Plan, Building Zone Map and official records of actual permitted land use along the thoroughfares in question.

Pacifica Foundation, No. 77-528, decided July 3, 1978. In holding that the FCC could impose reasonable restrictions on the time of broadcast of a particular monologue patently offensive to many, the Court reasoned that the broadcast media, coming into "the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder," are unique in their intrusiveness. Slip op. at 20. "Outside the home," the Court said, "the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away." *Id.* n.27, citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), and citing and quoting from *Cohen v. California*, 403 U.S. 15, 21 (1971). In his concurring opinion, Mr. Justice Powell, joined by Mr. Justice Blackmun, specifically joined in this part of the prevailing opinion and repeated the thought there expressed. *Id.*, concurring opinion at 5. Dissenting, Mr. Justice Brennan, joined by Mr. Justice Marshall, embraced the doctrine of *Erznoznik* and *Cohen* but thought, contrary to the majority, that the radio listener, with his ability to turn off his set or turn to a different station, stood constitutionally with the person affronted by an unpleasant communication in a public place who is able to turn away. *Id.*, Brennan dissent at 4-5. Thus, there was general agreement among the Justices who expressed themselves that people outside their homes, free always to turn away, are not the "captive audience" that those who seek to repress speech so often profess to protect.

3. **The Regulation of Content.** In trying to distinguish this case from *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977), Southampton affirms that its ordinance is aimed at billboards in part because their messages are perceived to be commercial. It does this when it argues that the *Redwood City* ordinance infringed political speech but its ordinance concerns only commercial speech. (Motion 24.) We have shown in the

jurisdictional statement that Southampton is mistaken in its perception of the relative commercial and non-commercial content of billboard speech as contrasted with other media. In any event, it is too late in the day to justify a billboard prohibition, as the state court did in *Markham*, on the content-related ground of the "purely commercial nature" of outdoor advertising. *See Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

II. THE TAKING QUESTION

The decision below on the taking issue was that just compensation need not be paid by the Town of Southampton to Suffolk for the compelled removal of its billboards. Thus, contrary to Southampton's assertion (Motion 25-26), a decision has been made that the ordinance, which invoked the police power and not the power of eminent domain, may constitutionally be applied to Suffolk. The issue that Suffolk is free to pursue administratively following the final judicial decision dismissing its complaint is a different issue. It is whether a grace period provided by the ordinance for the removal of existing billboards, the so-called amortization period, is "reasonable" according to the Court of Appeals' standard of reasonableness. That court while rejecting the requirement of just compensation held that a billboard owner should be allowed to recover over time a substantial part of his investment. The allowance of a grace period was held by the court not to be the equivalent of just compensation; the Court of Appeals said, moreover, that its standard of "reasonableness" does not require that a billboard owner "be given that period of time necessary to permit him to recoup his investment entirely." (Jur. St. 5a.)

It is quite true (Motion 30-31) that the question of un-

compensated relocations of some billboards, tempered by provision for so-called amortization, was before the Court in the *Markham* case and, on a petition for certiorari, in *Art Neon Co. v. City and County of Denver*, 488 F.2d 118 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974). Neither case involved anything like the complete elimination of all existing billboards from a jurisdiction that this case does. The question whether such a complete elimination is consistent with the Fifth and Fourteenth Amendments has not been considered by this Court.[11] Even the question raised by *Markham* and *Art Neon* of compelled, uncompensated relocation of some billboards, subject to "amortization," has not been the subject of plenary consideration by the Court. For the reasons stated in the jurisdictional statement (which are scarcely addressed in the motion to dismiss) the question posed here should be considered by the Court.

In one of its last opinions of the 1977 Term, the Court reaffirmed that a taking may occur even though, as is true here, physical control over property has not been transferred to the government, *Penn Central Transp. Co. v. New York City*, No. 77-444, decided June 26, 1978, slip op. at 17 n.25; it also said that the question what constitutes a taking "has proved to be a problem of considerable difficulty," for the answer to which the Court "has been unable to develop any 'set formula,'" *id.* at 17; "indeed," the Court noted, "we have frequently observed that whether a particular restriction will be rendered invalid by the Government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case,'" *id.* at 18. We submit that the circumstances here, especially the direct and substantial impact of the ordinance on Suffolk — "the extent to which [it] has interfered with distinct investment backed expectations," *id.* — and the uncertain, attenuated nature of the governmental interest the ordinance is intended to further, call for compensation in "justice and fairness," *id.* at 17. The question at any rate is a substantial one.

[11]The question whether the Maine billboard statute deprives the billboard proprietors of their property without just compensation was reserved by agreement of the parties and therefore not ruled on in the district court's decision of July 11. John Donnelly & Sons v. Mallar, D. Me. Civil No. 77-284-SD, decided July 11, 1978, slip op. at 8 n.7.

CONCLUSION

For the reasons stated in the jurisdictional statement and this brief, probable jurisdiction should be noted and the case set for consideration on the merits.

Respectfully submitted,

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